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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners,

against

UNITED STATES OF AMERICA, *et al.*,
Respondents.

REPLY BRIEF OF RESPONDENT 3¼% MORTGAGE BONDHOLDERS' PROTECTIVE COMMITTEE

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Questions Presented

1. Whether the reorganization court has the power to authorize a shutdown of the Debtor's lines, or all of its lines, without authorization of the Interstate Commerce Commission.

2. Whether an order of the Interstate Commerce Commission authorizing the Debtor to abandon portions of its lines must be appealed to a three-judge court or must it be made to the reorganization court.

Statement

The Respondent 3¼% Mortgage Bondholders' Protective Committee was authorized by the Interstate Commerce Commission, by order dated September 13, 1968 in Finance Docket No. 24535, to solicit and represent holders of the Debtor's 3¼% Mortgage Bonds.

The reorganization court permitted this Respondent to intervene in this proceeding by order dated and entered October 1, 1969. That order was affirmed by the Court of Appeals for the Third Circuit by order dated July 17, 1970. An application to reverse the order of that court was made to this Honorable Court which denied certiorari on March 1, 1971.

This Respondent, through counsel, has taken part in all proceedings in this matter in the reorganization court, the Court of Appeals, this Honorable Court and before the Interstate Commerce Commission. It represents a substantial amount of the outstanding bonds.

We believe that the briefs of the Trustee and other Respondents will set forth the relevant facts, so that it will not be necessary for us to burden this Court with repetitious statements.

We also have been advised that the briefs of the Trustee and other Respondents will cite the relevant legal decisions and authorities so that it will not be necessary to set forth an extended discussion of the applicable law herein.

This Respondent respectfully submits that the reorganization court below acted properly and with full authority in making the orders involved in this petition, namely Order No. 445 and Order No. 451 and that they were properly affirmed by the Court of Appeals for the Third Circuit. The affirmance should stand and the petition for the writ of certiorari should be denied.

ARGUMENT

I

The reorganization court has the power to order, as it did in Order No. 445, suspension of the Debtor's Pennsylvania lines on April 1, 1972 and cessation of all its operations if the Trustee's application to the Interstate Commerce Commission to abandon should be denied in whole or in any respect which the court finds is not in the best interest of the Debtor's estate.

The Debtor has lost and is continuing to lose substantial sums of money annually. These losses amount to millions of dollars each year. As a result of its familiarity with the Debtor's operations and after taking testimony as to its losses, the reorganization court was convinced that the Debtor could not continue in business unless its operations in the Commonwealth of Pennsylvania were eliminated.

Early in 1971 the reorganization court authorized the Trustee to apply to the Interstate Commerce Commission for leave to abandon the Debtor's Pennsylvania lines.

Because of the Debtor's continued losses, and in the reorganization court's opinion of the disastrous effect of

the losses of the Pennsylvania lines on the Debtor's entire system, the court decided that it was necessary to suspend all operations in Pennsylvania on April 1, 1972 and it issued Order No. 445. We respectfully submit that the reorganization court has that power and that it properly made that order.

This Honorable Court has set forth the underlying principles governing railroad reorganizations in *New Haven Inclusion Cases,* 399 US 392, 26 LEd 2d 691, 90 SCt. 2054 (1970), in which Mr. Justice Stewart's opinion stated (p. 431):

> "After 35 years of §77, as amended, it is unnecessary to recanvass the two basic objectives of the statute —the conservation of the debtor's assets for the benefit of creditors and the preservation of an on going railroad in the public interest. See generally 5 Collier, supra ¶77.02, at 469-470. Central to the statutory objective that the reorganized company should, if at all possible, emerge as a 'living, not a dying * * * enterprise', Van Schaick v. McCarthy, 116 F 2d 987, 993, is the understanding that 'a railroad [is] not like an ordinary insolvent estate.' Palmer v. Massachusetts, 308 US at 86, 84 L Ed at 99. (Footnote omitted). * * *"

The reorganization court found, in issuing Order No. 445 that the suspension of Debtor's operations in the Commonwealth of Pennsylvania would permit the continuation of part of Debtor's railroad which will serve a tremendous number of industries and will preserve the Debtor's assets. The reorganization court therefore exercised the power and jurisdiction given to it by the Bankruptcy Act.

There are many authorities which may be cited in other briefs herein to sustain the power and jurisdiction of a reorganization court to order a suspension or shutdown of a railroad's operations. Such shutdowns are justified not only by the physical condition of the railroad, but also by the lack of finances necessary to operate the road.

As this Honorable Court pointed out in the *New Haven Inclusion Cases* (*supra*), at 415, Judge Anderson (the reorganization judge in those cases) ruled that because of the New Haven's dwindling cash reserves, unless the Interstate Commerce Commission ordered inclusion of the New Haven into the Penn Central by January 1, 1969, he would entertain a motion to dismiss the reorganization proceeding, resulting in termination of all the New Haven's train service.

We respectfuly submit that there is no reason why the reorganization court in this proceeding was not also justified in shutting down all of the Debtor's operations in the face of continued drastic losses.

It should also be noted, in balancing the equities of the situation, that the petitioner, Commonwealth of Pennsylvania, has not offered, at any time, any plan or suggestion whereby the Debtor's lines in Pennsylvania could continue to be operated without continued, substantial losses, nor has it offered any financial subsidy which would enable the Debtor to continue the operation of those lines. The reorganization court and the Court of Appeals undoubtedly considered the equities as well as the legal factors involved.

We submit, therefore, that the affirmance by the Court of Appeals of the reorganization court's Order No. 445 should stand, and that a writ of certiorari should not issue.

II

An appeal from an order of the Interstate Commerce Commission authorizing the Debtor to abandon portions of its lines must be made to the reorganization court.

We respectfully submit that any appeal from an order of the Interstate Commerce Commission authorizing the Debtor to abandon portions of its lines must be made to the reorganization court.

Section 77(a) of the Bankruptcy Act (11 USC, Sec. 205(a)) states, in part:

> "(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. * * * If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. * * *."

Section 77(o) of the Bankruptcy Act (11 USC Sec. 205(o)) states in part:

> "(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any,

should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. * * *".

We respectfully submit that these provisions confer authority upon the reorganization court to review orders of abandonment issued by the Interstate Commerce Commission.

The opinion of Mr. Justice Stewart of this Honorable Court in *New Haven Inclusion Cases* (*supra*), states ample authority for asserting the authority of the reorganization court in this regard. The ultimate question there was the price to be paid by Penn Central for the assets of the New Haven. The Interstate Commerce Commission's order fixing that price was remanded by the reorganization court for further proceedings, ruling that, because of the con-

tinuing drain on the New Haven's dwindling cash reserves, unless the Commission ordered inclusion by January 1, 1969, the Court would entertain a motion to dismiss the reorganization proceeding resulting in termination of all the New Haven's train service.

The Commission certified a revised plan which again was rejected by the reorganization court. An appeal was taken to a three-judge court, which denied the bondholders' application for injunctive relief. Mr. Justice Stewart said (p. 419):

> "* * *. From the outset all the parties in the three-judge court recognized that the pricing questions presented in the litigation there were also destined to come before the reorganization court under §77 of the Bankruptcy Act. * * *",

and in commenting on the three-judge court's ruling, he said (p. 420):

> "In this ruling, the three-judge court was correct. The jurisdiction of the reorganization court was not open to question. Upon its approval of the New Haven's petition for reorganization in 1961, that court had acquired 'exclusive jurisdiction of the debtor and its property wherever located * * *.' Id. §77(a) 11 USC §205(a) * * *". (Citing cases in footnote 52).

There are a number of other statements in Mr. Justice Stewart's opinion which underscore the reorganization court's jurisdiction. On page 421, he stated:

> "* * * Together the [reorganization] court and the Commission 'unquestionably' had 'full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that [might] be

asserted against it.' Callaway v Benton, 336 US 132, 147, 93 L Ed 553, 564, 69 S Ct 435. One such power was precisely that which the Commission was about to propose that the reorganization court exercise—the power to confirm a plan of reorganization providing for 'the sale of all * * * of the property of the debtor * * *' Bankruptcy Act, §77(b)(5), 11 USC §205(b)(5). To that end the Commission was required to certify its proposal to the court as a prerequisite to judicial approval. §77(d), 11 USC §205(d). Injunctive intervention by the three-judge court would thus have disrupted an essential statutory phase of the New Haven reorganization."

Interference by a three-judge court, as requested by the appellants would similarly disrupt this proceeding, particularly since the Commission has issued an order to abandon the Debtor's Pennsylvania lines.

It is argued that the three-judge court should review the Commission's order of abandonment. However, Mr. Justice Stewart's opinion disposed of that argument. Referring to situations where a three-judge court has been asked to consider the same pricing questions as the reorganization court, he said (p. 426):

"* * *. We recognize that that principle has commonly applied in cases where both courts assert in rem jurisdiction over the property in dispute, and that here the three-judge court's jurisdiction was in personam in character. But the conflict was nonetheless one 'between two coordinate courts of concurrent, overlapping jurisdiction, neither belonging to a class which by paramount law is categorically given a jurisdiction over the particular subject matter paramount to the jurisdiction of the other.' In re New York, N.H. & H.R. Co., 26 F Supp 18, 24, aff'd sub nom Palmer v.

Warren, supra. And given that conflict the three-judge court could have followed the settled proposition that '[t]he court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto.' Lion Bonding & Surety Co. v Karatz, 262 US 77, 89, 67 L Ed 871, 880, 43 S Ct 480.

Surely a vesting of primary jurisdiction in the reorganization court comports with the basic purpose of §77. * * *".

This Honorable Court has recognized and affirmed the power of the reorganization court to order a debtor railroad to cease all operations and liquidate if the court finds that further operations of the debtor solely for the public interest would violate the Fifth Amendment as an unconstitutional taking of the debtor's property. *New Haven Inclusion Cases* (*supra*).

As we have pointed out above, Judge Anderson, sitting as reorganization court for the New Haven Railroad under §77 (*In re New York, N.H. & H. R. Co.*, 289 F Supp 451; D. Conn. 1968) ordered that the inclusion of the New Haven in the Penn Central system take place no later than January 1, 1969, or he would permit no further financing of the railroad's deficit operations at the expense of the New Haven estate, and, as a result the line would shut down.

In recognizing Judge Anderson's power to do so, Mr. Justice Stewart's opinion stated (pp. 490-491):

> "A §77 reorganization court may not, of course, disregard a claim that injurious consequences will result to a secured creditor from the suspension of the right to enforce his lien against the property of a

> debtor. That claim, however, 'presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised.' Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & P.R. Co. 294 US 648, 677, 79 L Ed 1110, 1129, 55 S Ct 595. Here the reorganization court recognized its duties under the Bankruptcy Act and the Constitution. * * *."

This Honorable Court thus affirmed the power of the reorganization court to order a shutdown of a debtor's entire operation. In affirming that power, the opinion quoted Judge Anderson's ruling with approval in which he stated (p. 491):

> "'In view of the history of this deficit operation from the time of the filing of the petition under §77 and even before, the size of the losses, the long period of time necessarily involved in seeking to work out a solution, short of liquidation, through inclusion in the Penn-Central, the present condition of the Railroad and the rate of loss and out-flow of cash in the recent past and in the foreseeable future, this court finds that the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders, without just compensation. It is therefore constitutionally impermissible, and obviously no reorganization plan which calls for such a taking can be approved.' 289 F Supp, at 459."

Judge Anderson had the power to shut down the New Haven because of its condition and doubt of its future continuance. Judge Augelli, the reorganization judge in this proceeding, who has knowledge of the facts concerning this Debtor's condition and of its bleak prospects, certainly has

the power to order a partial shutdown of its operations, and the paramount power to review an order of the Interstate Commerce Commission which authorized abandonment of some of the Debtor's lines.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari to review the judgments and opinions of the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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